

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 09-10049-RGS

EDWARD S. McLARNON

v.

UNITED STATES OF AMERICA, et al.

MEMORANDUM AND ORDER

May 19, 2009

STEARNS, D.J.

Plaintiff Edward McLarnon, a resident of Malden, Massachusetts, filed this civil action alleging violations of his constitutional rights arising from prior litigation (a 2001 case in the Middlesex Superior Court,¹ a 2006 case in the United States District Court for the District of Massachusetts,² and a 2007 appeal to the United States Court of Appeals for the First Circuit³). McLarnon claims that the defendant judges, lawyers, and court personnel involved in his three previous lawsuits engaged in a criminal conspiracy and “that lawyer-run racketeering schemes . . . for which the MRA and Malden are fronts depend on the criminal enterprise in District Court and the Court of Appeals to alter court records . . . to cover up their crimes.”⁴ Complaint ¶ 155. McLarnon seeks both damages

¹McLarnon v. City of Malden, No. 01-0660 (Middlesex Super. Ct. Aug. 5, 2004).

²McLarnon v. City of Malden, et al., No. 06-11815-RWZ.

³ McLarnon v. City of Malden, No. 07-2249.

⁴Named as defendants are the United States of America, Federal Bureau of Investigation (FBI); Director Robert Mueller, FBI agent Warren Bamford, FBI Agent Jon T. Foley (the Federal Defendants); Hon. Rya W. Zobel, Hon. Mark L. Wolf, Hon. Sandra Lynch (the Judicial Defendants); Jay Johnson, Lisa Urso, Mike Cataldo, Jane Doe (the Clerk Defendants); the City of Malden, Richard Howard, Mayor of Malden, Edward Wheeler, the Assistant Solicitor for the City of Malden, Jack Russell, the Chief Engineer

and equitable relief.

For the reasons stated below, McLarnon's Application to Proceed Without Prepayment of Fees is ALLOWED. McLarnon is required, however, to demonstrate good cause why this action should not be dismissed.

BACKGROUND

In 2001, McLarnon brought a nuisance action in the Massachusetts state court, alleging that Water Works Supply Corporation, and the City of Malden were liable for the flooding of his home and his home-based audio-project business. Complaint ¶¶ 27 and 37. McLarnon alleges that defendants "colluded with the state judge and violated plaintiff's First Amendment right to petition government with a true and accurate record, and violated his right to a jury trial, fair tribunal and civil redress." Id. at ¶ 29. McLarnon also complains that he had to wait a "year and a half for transcripts" from the state court. Id. at ¶ 30.

In 2006, McLarnon filed suit in the federal district court concern all the civil rights violations that allegedly occurred during his state court litigation. McLarnon's federal suit, however, soon encountered similar problems. McLarnon alleges that federal court employees made fraudulent docket entries, suppressed evidence, and altered transcripts. He also complains that a federal judge unfairly dismissed his claims: specifically, he asserts that contrary to a docket clerk's assurances, the district judge dismissed defendants for want of proper service. Id. at ¶ 54. The district judge, sua sponte, also dismissed the Commonwealth as a defendant, despite proper service having been made. Id. at ¶¶ 121 and 122. The district judge further dismissed McLarnon's claims against

for the City of Malden, Gary Stead (the Malden Defendants); the Malden Redevelopment Authority (MRA), and Stephen Wishoski, its Executive Director (the MRA Defendants); the Waterworks Supply Corporation, Damon Moore, and Leo P. Demarco II (the Waterworks Defendants); Massachusetts attorney Gregory Hession; federal court reporter Catherine Handel; and alleged former Pennsylvania attorney Gene Wrona.

defendant Hession, his attorney in the state court action, and, “acting as a lawyer,” dismissed several other defendants, “all improperly.” Id. at ¶ 102.

The Complaint also contains allegations that the federal district judge and her clerk “suppressed evidence” by failing to enter an affidavit “on the record.” Id. at ¶ 84. Another clerk refused to enter defaults against several deserving defendants. McLarnon’s grievances additionally include the judge’s delay in ruling on his uncontested motions for several months; denying him an ex-parte hearing and transcripts at government expense; and failing to insure that an in forma pauperis (IFP) ruling was entered on the docket. Id. at ¶¶ 65 - 70. McLarnon contends that he unsuccessfully sought to have these docket errors corrected, and that his written requests for assistance from the Chief Judges of the district and appeals courts were rebuffed. Id. at ¶¶ 57, 107, 125, 130.

The instant case also includes claims against the United States as it “demands taxes and court fees from citizens” and is answerable for the criminal conspiracy involving the federal defendants. Id. at ¶¶ 40-45. As for the FBI defendants, McLarnon complains that certain FBI agents “knowingly used the U.S. Mail to forward their fraudulent letter they wrote to cover-up the crimes in District Court.” Id. at ¶ 136. McLarnon further asserts a state law claim against Gene Wrona, a Pennsylvania resident who McLarnon hired to assist him in obtaining a license from Congress as a “Private Attorney General to be able to depose and prosecute judges as a private citizen.” Id. at ¶¶ 142-148. Lastly, McLarnon seeks to incorporate various pendent state nuisance and attorney malpractice claims.

DISCUSSION

I. Application to Proceed Without Prepayment of Fees

McLarnon’s financial disclosures reveal that he is unemployed and that his sole source of income is from the Department of Transitional Assistance. His home is in

foreclosure and he has an automobile valued at \$1,000. In view of these disclosures, the court finds that McLarnon lacks sufficient funds to pay the \$350.00 filing fee. Therefore, the Application to Proceed Without Prepayment of Fees will be allowed.

II. The Court May Screen This Action

McLarnon seeks in forma pauperis status. Accordingly, the court will review McLarnon's Complaint to determine whether it satisfies the substantive requirements of the federal IFP statute. See 28 U.S.C. § 1915. Section 1915 of Title 28 authorizes federal courts to dismiss actions, sua sponte, where an IFP plaintiff lacks an arguable basis for a claim either in law or in fact. See Denton v. Hernandez, 504 U.S. 25, 32-33 (1992); Neitzke v. Williams, 490 U.S. 319, 325 (1989); 28 U.S.C. § 1915(e)(2).

III. The Complaint is Subject to Dismissal.

A. Res Judicata

To the extent McLarnon seeks to relitigate the state court nuisance claims against the City of Malden and the Water Works Defendants, they must be dismissed on grounds of res judicata.

In Massachusetts, res judicata encompasses both claim preclusion and issue preclusion. Claim preclusion prevents the relitigation of all claims that a litigant had the opportunity and incentive to fully litigate in an earlier action. Massachusetts evaluates three elements under the doctrine of claim preclusion: (1) the identity or privity of the parties to the present and prior actions; (2) identity of the cause[s] of action; and (3) a prior final judgment on the merits. When assessing the second element of claim preclusion, Massachusetts courts find [c]auses of action [to be] identical if they derive [] from the same transaction or series of connected transactions.

Giragosian v. Ryan, 547 F.3d 59, 63 (1st Cir. 2008), citing TLT Const. Corp. v. A. Anthony Tappe & Assoc., 48 Mass. App. Ct. 1, 4-6 (1999). Here, all three requirements are met; the parties are the same, the allegations are identical, and a final judgment was entered. McLarnon cannot pursue the nuisance claims in federal court simply because he is

displeased with the outcome of the state court proceeding.

B. Civil Rights Claims

I. State Action

The Complaint names various private entities and individuals as defendants. The section 1983 claims against the non-state defendants are subject to dismissal because there are no allegations that they were acting under color of state law as required by the federal statute. See Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 191 (1988).⁵ Section 1983 does not in most instances provide relief against private parties. Gonzalez-Morales v. Hernandez-Arencia, 221 F.3d 45, 49 (1st Cir. 2000). In order for a private actor to be deemed to have acted under color of state law, it is not enough to show that the private actor performed a public function. Instead, a plaintiff must demonstrate the existence of: "(1) an elaborate financial or regulatory nexus between defendants and the government [] which compelled defendants to act as they did; (2) an assumption by defendants of a traditional public function; or (3) a symbiotic relationship [between the individual and the state] involving the sharing of profit." Barrios-Velazquez v. Asociacion de Empleados del Estado Libre Asociado de Puerto Rico, 84 F.3d 487, 493

⁵Section 1983 states, in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

(1st Cir. 1996). See also Rockwell v. Cape Cod Hosp., 26 F.3d 254, 258 (1st Cir. 1994) (same). McLarnon has alleged no facts indicating that any of these tests are met. His claims against the non-state defendants are thus subject to dismissal. Ciambriello v. County of Nassau, 292 F.3d 307, 324 (2d Cir. 2002) (conclusory allegation that a private entity acted in concert with a state actor did not suffice to state a section 1983 claim against the private entity).

ii. Conspiracy Claims

To the extent that McLarnon's Complaint is based on a theory that defendants "conspired" against him, the claims are subject to dismissal. Broad conclusory allegations of conspiracy are insufficient to state a section 1983 claim. See, e.g., Slotnick v. Stavisky, 560 F.2d 31, 33 (1st Cir. 1977); See also Hamilton v. Arnold, 135 F. Supp. 2d 99 (D. Mass. 2001), aff'd 29 Fed. Appx. 614, 2002 WL 109581 (1st Cir. Jan. 23, 2002) (granting summary judgment for defendants in a section 1983 action where plaintiff failed to prove existence of an agreement between attorney and judge to deprive plaintiff of fair divorce proceedings); Scott v. Hern, 216 F.3d 897, 907 (10th Cir. 2000) ("When a plaintiff in a § 1983 action attempts to assert the necessary 'state action' by implicating state officials or judges in a conspiracy with private defendants, mere conclusory allegations with no supporting factual averments are insufficient; the pleadings must specifically present facts tending to show agreement and concerted action.").

iii. Judicial Immunity

To the extent that McLarnon asserts claims against Judges Zobel, Wolf, and Lynch based on his dissatisfaction with the manner in which these judges dealt with his complaints, the doctrine of judicial immunity requires dismissal. The doctrine protects judges from suit for any normal and routine judicial act. See, e.g., Mireles v. Waco, 502

U.S. 9, 11 (1991) (per curiam) (“[J]udicial immunity is an immunity from suit, not just from the ultimate assessment of damages.”); Pierson v. Ray, 386 U.S. 547, 553-554 (1967) (absolute judicial immunity protects the integrity of judicial process); Cok v. Cosentino, 876 F.2d 1, 2 (1st Cir. 1989) (per curiam) (same).

Only judicial actions taken in the clear absence of all jurisdiction will deprive a judge of absolute immunity. See Stump v. Sparkman, 435 U.S. 349, 356-357 (1978). Even where, as here, a plaintiff alleges that a judge conspired with one party to rule unfavorably against him, or that a decision was legally incorrect, such allegations do not pierce the immunity shield. See Moore v. Brewster, 96 F.3d 1240, 1244 (9th Cir. 1996). See also Stump, 435 U.S. at 356-357; Pierson, 386 U.S. at 553-554.

iv. Defendant Clerks Johnson, Urso, Cataldo, and
Handel Have Quasi-Judicial Immunity

Judicial employees, such as defendants Johnson, Urso, Cataldo, Handel, and the unnamed “Jane Doe” clerk, have quasi-judicial immunity when they perform tasks that are an integral part of the judicial process. See Gallas v. Supreme Court of Pennsylvania, 211 F.3d 760, 772 (3d Cir. 2000) (deputy court administrator); Mullis v. United States Bankr. Ct. for the Dist. of Nevada, 828 F.2d 1385, 1390 (9th Cir. 1987) (clerks and deputy clerks). McLarnon makes no allegations concerning these court personnel which fall outside their performance of judicial tasks. Therefore, the claims against these defendants are also subject to dismissal. See Gallas, 211 F.3d at 772; cf. Dellenbach v. Letsinger, 889 F.2d 755, 763 (7th Cir. 1989) (“The danger that disappointed litigants, blocked by the doctrine of absolute immunity from suing the judge directly, will vent their wrath on clerks, court reporters, and other judicial adjuncts – alleging as here a conspiracy between the adjunct and the judge – warrants this extension of the [judicial immunity] doctrine.”).

C. The Civil RICO Claim

McLarnon alleges jurisdiction pursuant to 18 U.S.C. §§ 1964(c), 1962(c) and 1961 of the United States Code. See Complaint ¶ I(D). Section 1964 creates a private right of action for litigants claiming a violation of section 1962 of RICO. To plead a civil RICO claim, a plaintiff must allege the following: “(1) conduct, (2) of an enterprise, (3) through a pattern, (4) of racketeering activity.” Giuliano v. Fulton, 399 F.3d 381, 386 (1st Cir. 2005), quoting Kenda Corp. v. Pot O’Gold Money Leagues, Inc., 329 F.3d 216, 233 (1st Cir. 2003).

An “‘enterprise’ includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.” 18 U.S.C. § 1961(4). McLarnon has not alleged that any of the named defendants constituted an “enterprise.” Moreover, a defendant named only as a “person who has violated the RICO statute” cannot also simultaneously serve as the RICO enterprise itself. Doyle v. Hasbro, Inc., 103 F.3d 186, 191 (1st Cir. 1996). Therefore, none of the named defendants can be considered an “enterprise” under section 1962(c). Id. McLarnon’s failure to identify any enterprise distinct from a named defendant is by itself a sufficient ground to dismiss his RICO claims. Id. Further, to plead a “pattern of racketeering activity,” a plaintiff must allege at least two predicate acts. 18 U.S.C. § 1961(5); Miranda v. Ponce Fed. Bank, 948 F.2d 41, 45 (1st Cir. 1991) (“[I]t is settled beyond peradventure that civil liability under 18 U.S.C. § 1962(c) requires a named defendant to have participated in the commission of two or more predicate crimes within the compendium described in 18 U.S.C. § 1961(1).”). Predicate acts are those indictable under laws specified in the RICO statute. See 18 U.S.C. § 1961(1). A complaint must identify the predicate act upon which the plaintiff bases his claim – the plaintiff may not simply “file a RICO action, chant the statutory mantra, and leave the identification of

predicate acts to the time of trial.” Ahmed v. Rosenblatt, 118 F.3d 886, 889 (1st Cir. 1997), quoting Feinstein v. Resolution Trust Corp., 942 F.2d 34, 42 (1st Cir. 1991).

In order to state a claim for conspiracy to violate Section 1962(c), a plaintiff must allege (at a minimum): (1) the existence of an enterprise, (2) that each defendant knowingly joined the enterprise, and (3) that each defendant agreed to commit, or in fact committed, two or more specified predicate crimes as part of his participation in the enterprise. Feinstein v. Resolution Trust Corp., 942 F.2d 34, 41 (1st Cir. 1991). A bare assertion that defendants conspired to violate RICO is insufficient to state a claim for a RICO conspiracy. A plaintiff must make factual allegations regarding the material elements of the offense, including an agreement to violate RICO. Id. McLarnon only makes only bare and conclusory allegations regarding defendants’ alleged collective racketeering activity and fails to identify specifically any predicate acts or to allege any facts that would indicate that any violation of the laws specified in section 1961(1) has occurred. McLarnon thus has failed to state a RICO claim. See Cok, 876 F.2d at 2.

D. Claims Against Defendant Wrona

McLarnon asserts that the claim against Wrona (apparently, a breach of contract) is brought under federal question and diversity jurisdiction. District courts have original jurisdiction over civil actions between citizens of different states where the amount in controversy exceeds \$75,000. See 28 U.S.C. § 1332(a). However, diversity must be complete: the citizenship of each plaintiff must be shown to be diverse from that of all the defendants. Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 373-374 (1978). Here, McLarnon is suing Massachusetts defendants and one Pennsylvania defendant. Diversity therefore does not exist.

To the extent McLarnon seeks to include one or more pendent state claims against

Wrona, the court will decline to exercise supplemental jurisdiction. As a rule, the unfavorable disposition of a plaintiff's federal claims at the early stages of a suit will trigger the dismissal without prejudice of any supplemental state law claims. Gonzalez-De Blasini v. Family Dep't, 377 F.3d 81, 89 (1st Cir. 2004), citing Rodriguez v. Doral Mortgage Corp., 57 F.3d 1168, 1177 (1st Cir. 1995).

ORDER

For the foregoing reasons, Plaintiff's Application to Proceed Without Prepayment of Fees is ALLOWED. It is further ORDERED that McLarnon demonstrate good cause, in writing, within thirty-five (35) days of the date of this Memorandum and Order, why this action should not be dismissed for the reasons stated. No summons shall issue pending further Order of this court.

SO ORDERED.

/s/ Richard G. Stearns

UNITED STATES DISTRICT JUDGE